United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

10/2

74-1812

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELENA CLASS, ET AL, *Plaintiffs-Appellees*

v.

NICHOLAS NORTON, ET AL, *Defendants-Appellants*

ON APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

BRIEF OF APPELLANT

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ISSUE

As a result of the revision of HEW regulations, was the Defendant-Commissioner of Welfare entitled to relief from the prospective application of the District Court's permanent injunction.

STATEMENT OF THE CASE

This is an appeal from the District Court's Ruling On Defendant's Motion For Relief From Judgment brought pursuant to Rule 60(b), and entered on May 13, 1974, denying the defendant, Commissioner of Welfare, the relief sought therein. This case, brought originally in December of 1971, was one in which the plaintiffs alleged, *inter alia,* that the Welfare Commissioner of the State of Connecticut was in violation of 42 U.S.C. Sec. 602 and 45 C.F.R. 206.10 (a) (3), in that he was not processing applications under the Aid to Families With Dependent Children (hereinafter referred to as AFDC) within thirty days as required by the regulations promulgated by the Secretary of Health, Education and Welfare (hereinafter referred to as HEW) in the aforesaid 45 C.F.R. Sec. 206.10(a)(3).

In that action, the plaintiffs sought also, *inter alia,* to require the defendant, Commissioner, to make payments, for those AFDC applicants who were determined to be eligible therefor, effective from the date of application, rather than in the manner then employed which had resulted in different effective dates from which payments of public assistance benefits would be made to applicants, depending upon when the AFDC application was approved by the welfare department.[1]

By Memorandum of Decision entered on June 16, 1972 [A,7], the District Court found, *inter alia,* that the defen-

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[1]If an application was approved during the same month in which it was submitted, welfare assistance was granted effective from the first day of that month; if an application was granted in the month following the month in which it was submitted, but less than thirty days from the date of application, assistance was granted effective from the first day of the following month; and, finally, if an application was not processed within thirty days, payment of assistance was made effective from the thirtieth day after application.
This method of computing the effective date from which AFDC payments would be made was in accord with HEW regulations and was approved in the *amicus* brief which was submitted by HEW in this case.

dant, Commissioner, was out of compliance [A,10] with 45 C.F.R. Sec. 206.10(a)(3) in that he had failed, in a substantial number of cases, to process AFDC applications within the required thirty day period. The Court also found [A,12] that the method by which the defendant determined the date upon which payment of welfare benefits would become effective (depending upon the date on which the application was approved, as described *supra*) was contrary to the HEW regulation contained in 45 C.F.R. Sec. 233.20(a)(1).[2] The defendant was enjoined, under penalty of a cutoff of federal funds, from failing to process AFDC applications within the thirty day period as required by the regulations.[3] The Court further ordered that the defendant's method of determining the effective date of assistance payments to AFDC applicants found eligible be enjoined, and that welfare assistance was to be effective from the date of application for all applicants found eligible for assistance.

The defandant, Commissioner, thereafter (and continuing to the present time), in compliance with the court order, did make payments effective from the date of application for all AFDC applicants found eligible for assistance.

Subsequently, on April 20, 1973, a notice of proposed (revised) regulations was published by HEW in 38 Federal Register 7623. On August 15, 1973, HEW issued revised regula-

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[2](a) Requirements for state plans. A State plan for OAA, AFDC, AB, APTD, or AABD must, as specified below:
(1) General. Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way, except, where otherwise specifically authorized by federal statute.

[3]The Court, in its opinion, also recited that this method of determining the date from which payment of benefits would be effective resulted in different treatment of AFDC recipients and thereby resulted in a denial of equal protection. Since under 28 U.S.C. Sections 2281-2284, a three-judge court would be required to make such a finding, the defendant believes that the District Court's decision must rest *solely* on the "statutory" ground of being contrary to the HEW regulation, and that the court's recital of a denial of equal protection must be regarded as dicta.

tions in 38 Federal Register 22005, *et seq*. The HEW regulation contained in 45 C.F.R. Sec. 206.10(a)(3) was revised so as to increase the time allowed the state agency for processing AFDC applications from a period not in excess of thirty days to a period not in excess of forty-five days. The revised regulations also provided at Sec. 206.10(a)(6) that:

> "Assistance shall begin as specified in the State plan, which:
>
> (i) For financial assistance
>
> (A) Must be no later than:
>
> (1) The date of authorization of payment, or
>
> (2) Thirty days in . . . AFDC . . . from the date of receipt of a signed and completed application form, whichever is earlier: *Provided*, That the individuals then met all the eligibility conditions. . .
>
> (B) For purposes of Federal financial participation, may be as early as the first of the month in which an application has been received and the individual meets all the eligibility conditions. . ."

Thereafter, on August 30, 1973, the defendant brought a motion for relief [S.2] in which he sought to have the District Court modify its Judgment, so as to allow the defendant to comply with the revised HEW regulations as aforesaid by allowing a period not in excess of forty-five days (instead of thirty days) in which to process AFDC applications, and to make AFDC assistance payments effective from a date no later than the date of authorization or thirty days from the date of application, whichever is earlier. Said motion for relief was argued before the court on September 13, 1973, but a decision on this motion was not handed down until May 13, 1974.

However, subsequent to the hearing on defendant's motion for relief, on September 13, 1973, and prior to its denial on May 13, 1974, the plaintiffs brought a Motion for Contempt

which was argued on January 10, 1974, and decided on March 22, 1974. On said date, the District Court in its Ruling on Plaintiffs' Motion for Contempt And Other Relief did not find the defendant, Commissioner, to be in contempt of the Court's prior orders. The Court did find, however, that there was extensive non-compliance by the defendant with the thirty-day processing requirement of the Court's prior orders[4] [A,20] and entered certain orders to bring about compliance therewith.[5]

Thereafter, on May 13, 1973, the Court denied the defendan't Motion For Relief From Judgment which had originally been argued on September 13, 1973, and the defendant took this appeal.

In its Ruling on Defendant's Motor For Relief, the Court gave the following reasons for denying the relief requested:

1. Extensive non-compliance by defendants with the Court's previous orders is "a significant consideration." [A,33];

2. Such relief would not be "equitable since the defendant's non-compliance with the Court's prior orders had been inexcusable and unjustified, "and they cannot seek relief from this court while their own hands are so unclean." [A,34];

3. The relief sought would be inappropriate under 45 C.F.R. Section 206.10(a)(5) of the amended regulations. [A,35];

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[4]Certain portions of that decision have been appealed to this Court in No. 74-1702.

[5]The defendant, Commissioner, was ordered, *inter alia*, within 15 days, to make the retroactive payments which had originally been ordered but had not been paid; to file a written report with the Court on the status of these payments; and to file monthly reports on the status of the processing of AFDC applications.

4. The changes in the HEW regulations do not constitute the "extraordinary circumstances required for relief under Rule 60(b)(6). [A,34]

ARGUMENT

I.

Defendant, Commissioner was entitled to have the District Court rule on his Motion for Relief prior to Ruling on Plaintiff's Motion for Contempt.

First of all, the defendant, Commissioner, believes that he was entitled to have the District Court rule on his motion for relief from judgment, argued on September 13, 1973, prior to ruling on the plaintiffs' motion for contempt which was argued on January 10, 1974. Had the District Court done so, and had it granted the relief requested, the basis for the bringing of a contempt action might, perhaps, never have existed. But if such a basis had existed, the defendant, Commissioner, would have been judged in the contempt action on the basis of a forty-five day time standard for processing AFDC applications, and not on a thirty-day standard.

Had the District Court denied the defendant-Commissioner's motion for relief from judgment, as it subsequently did, the defendant would thereupon had an immediate right to appeal the Court's decision. By failing to rule on the defendant's motion for relief prior to ruling on the motion for contempt, the defendant was effectively deprived of either being allowed to process AFDC applications in accordance with the more lenient revised HEW regulations, or from the right to appeal from a denial of his motion for relief. Consequently, when the District Court ruled upon the plaintiff's motion for contempt, that ruling was made on the basis of the more severe standard of processing applications within thirty days, rather than the revised HEW standard of forty-five days.

II.

The new penalty provision promulgated by HEW on April 6, 1973, became a compelling reason why prospective application of injunction was inequitable to defendant.

Secondly, in applying the test applicable in this case under Rule 60(b)(5) as to whether "it is no longer equitable that the judgment should have prospective application", a most important additional consideration in making such a determination emerged as of April 6, 1973. On that date HEW published in 38 Federal Register, No. 66, p. 8744, Regulation [45 C.F.R.] Sec. 205.41.[6] This regulation provides that effective since January 1, 1974, HEW is invoking a penalty provision which denies to the State federal reimbursement for payments

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[6]Sec. 205.41 Federal financial participation in relation to erroneous State payments.

(a) Effective January 1, 1974, there shall be excluded from Federal financial participation in payments as aid to families with dependent children the proportions of a State's expenditures for ineligibles or for overpayments represented by the following percentages of cases in error:

(1) With respect to ineligible payments, for the 6-month period commencing

(i) January 1, 1974, one-third of the difference between the State's rate of ineligible cases for the period April 1, 1973, to September 30, 1973, and 3 percent;

(ii) July 1, 1974, two-thirds of such difference;

(iii) January 1, 1975, all of such difference.

(2) with respect to overpayments, for the 6-month period commencing

(i) January 1, 1974, one-third of the difference between the State's rate of overpayments in the eligible caseload for the period April 1, 1973, to September 30, 1973, and 5 percent;

(ii) July 1, 1974, two-thirds of such difference;

(iii) January 1, 1975, all of such difference.

(3) In addition, if the State's rate of ineligible cases or overpayments for any 6-month period exceeds that for the period April 1, 1973, to September 30, 1973, the difference between such rates.

(b) The amount of Federal financial participation to be excluded for each of the above specified periods will be determined from data filed with, and in accordance with methods prescribed by, the Social and Rehabilitation Service.

(c) For Guam, Puerto Rico, and the Virgin Islands, this section is also applicable to public assistance under title I, X, XIV, or XVI of the Social Security Act.

made to AFDC recipients subsequently found to be ineligible (beyond 3% of cases) and/or for overpayments (beyond 5% of overpayments) to eligible recipients. Needless to say, the shorter time period of thirty days (rather than forty-five days) in which the state is required, under the present Court order, to make a determination of eligibility results in a higher rate of error in approving AFDC applications. This higher rate of error translates into a very substantial loss of money to the State of Connecticut under the penalty provisions of the aforesaid Section 205.41 of the HEW regulations.[7] There can be little doubt that if the State had a forty-five day period in which to process applications (instead of the present thirty days) a very substantial decrease in the rate of error would result.

III.

Non-compliance with the Court's prior orders is not the proper criterion for determining whether relief from prospective application of injunction should be granted.

The defendant believes that he is entitled to relief from the prospective application of the injunction issued in this action under Rule 60(b)(5), and specifically, that portion thereof which provides that "it is no longer equitable that the judgment should have prospective application." A close reading of the District Court's ruling reveals that the court never made a determination that continued (prospective) application of the injunction would *not* be inequitable to the defendant in this case. The court did say that in view of the extensive non-compliance with the court's prior orders it would not

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[7]The State of Connecticut stood to lose approximately $220,000. under this penalty provision for the six-month period from January 1 to July 1, 1974. However, in a release in HEW News dated August 17, 1974, it is indicated that Secretary Weinberger has postponed the beginning of the penalty period from January 1, 1974, to July 1, 1974.

be "equitable" [A,34] and also that the relief sought should not be granted because of the defendant's lack of clean hands. But this indicates that the court was viewing the situation in a *retrospective* light only, and did not fully consider the inequity which would result to defendant from a prospective application of the injunction. The court had its inherent equitable power to hold the defendant in contempt and to invoke appropriate sanctions to deal with the retrospective noncompliance of its orders. Although stating [A,34] that defendant's non-compliance was inexcusable and unjustified, the District Court, nevertheless, did not find the defendant to be in contempt of its prior orders. Rather, the court had said [A,21], that "[T]here appear to be several factors contributing to the ineffective implementation of this Court's orders. At the hearing on this motion . . . [welfare department officials] both indicated in their testimony that delays in paying retroactive benefits and in processing pending applications could be traced to a lack of sufficient numbers of office personnel." The court went on to say [A,22], "[A] second factor contributing to the ineffective implementation of this Court's orders appears to be specific procedures utilized by local offices of the State Welfare Department in processing applications for assistance, a factor which may be attributed to a misunderstanding of the requirements of this Court's orders on the part of Welfare Department personnel." The District Court added further [A,25], "[A]lthough the failure of compliance with this Court's prior orders on the part of the Department appears to have been substantial, I have concluded that the drastic remedies which plaintiffs seek — citation for contempt and the issuance of an injunction preventing use of federal funds for the AFDC program in Connecticut — would be inappropriate in the circumstances of this case at this time. [citations omitted] It appears that much of the failure of compliance may have been the result of good faith attempts on the part of Department personnel to implement policies which were not sufficiently clarified by Department administrators."

Therefore, the reasons found by the District Court for defendant's non-compliance with the Court's prior orders may be summed up as (1) lack of sufficient office personnel; (2) the specific procedures utilized by the local offices which could be attributed to a misunderstanding of the requirements of the Court's orders; and, (3) much of the failure of compliance may have been the result of good faith attempts on the part of department personnel to implement policies which were not sufficiently clarified by department administrators.

The District Court did not find that the defendant's non-compliance was wilful, or intentional, or the result of any malice or ill-will. This may explain why the Court refused to find that the defendant was in contempt of the court's prior orders.

In *Tobin* v. *Alma Mills*, 92 F.Supp. 728, (1950) the Secretary of Labor brought an action to have defendants adjudged in civil contempt for violation of a judgment enjoining an employer from violating minimum wage and overtime provisions of the Fair Labor Standards Act. The court found, at page 736, that ". . . there has been a contempt of the injunction in the present action and in order to purge itself of the contempt, the defendant must make restitution of the unpaid overtime wages not barred by the statute of limitations and a compensatory fine in the amount of the expenses for the investigation and presentation of the case. . . . [T]he testimony shows that the defendant Alma Mills has made bona fide efforts to comply with the provisions of the judgment against it, and that such defendant did not intentionally or willfully violate the provisions of the same . . . [i]t is my opinion that it is no longer equitable that the judgments should have prospective application, and for this reason it should be ordered that all of the above named defendants be relieved from such judgments. Rule 60(b)(5,6), Rules of Civil Procedure, 28 U.S.C.A."

Thus, in the above case, the court found the defendant to be in contempt of its prior orders but, nevertheless, granted the defendant relief from the prospective application of the injunction. It should be remembered that, in this action, the defendant was seeking relief *only* from the *prospective* application of the injunction. If this relief were granted, he would in no way be excused from any liability to comply with the prior orders of the Court, nor would he in any other way profit from his past failure to so comply.

It is for this reason, the defendant submits, that the Court's invoking of the clean hands doctrine was a misapplication of that equitable principle.[8] The determination as to whether or not to award the relief requested should have been predicated on the effect which continued application of the injunction would have in the future. If, after viewing the matter in this light, the court deemed that continued enforcement would be inequitable, then the defendant was entitled to the relief requested.

In *McGrath* v. *Potash,* 199 F.2d 166, (CA DC 1952), after Congress passed a statute excluding deportation proceedings from the requirements of the Administrative Procedure Act, the District of Columbia Circuit vacated an injunction against the Government requiring compliance with that Act.

In *System Federation No.* 91 v. *Wright,* 364 U.S. 642, 5 L.Ed.2d 349, 81 S.Ct. 368 (1961), the petitioners filed in the District Court a motion for relief under Rule 60(b), asking for modification of a consent decree to make clear that it should have no prospective application to prohibit defendants from

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[8]The Court cited [A,34] *Frad* v. *Columbian National Life Ins. Co.,* 191 F.2d 22, 26 (2d Cir. 1951) in support of its claim. But *Frad* is readily distinguishable from the instant case. In that case, the plaintiff "... had defrauded the insurer and while keeping the fruits of his fraud sought the aid of a court of equity to have the policies reinstated." (191 F.2d at page 26).

entering into an agreement requiring a union shop. In 1951, the Railway Labor Act had been amended to permit, under certain circumstances, a contract requiring a union shop. The motion was denied by the District Court after a hearing at which unrebutted evidence was presented of assaults, destruction of property and other malicious acts directed by members of the union against any employee who had worked during a fifty-eight day strike.

The Supreme Court reversed for abuse of discretion the refusal of the District Court to modify the consent decree prospectively enjoining the parties from entering a union shop agreement, after such agreements had become valid by the amendment of the Railway Labor Act. In that opinion, the Court said, at 5 LEd2d 353:

> "[F]irmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided. Nevertheless the court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.' *United States* v. *Swift & Co. supra* (286 US at 111, 115). A balance must thus be struck between the policies of res judicata and the right of the court to apply measures to changed circumstances.
>
> "Where there is such a balance of imponderables there must be wide discretion in the District Court. But discretion is never without limits and these limits are often far clearer to the reviewing court when the new circumstances involve a change in law rather than facts. When the decree in this case was originally made, union shop agreements were prohibited by the Railway Labor

Act and thus constituted in themselves a form of statutorily forbidden discrimination. Congress has since, in the clearest terms, legislated that bargaining for and the existence of a union shop contract, satisfying the conditions provided in Sec. 2 Eleventh of the Railway Labor Act, are not forbidden discriminations by union or employer. Congress has therefore determined that whatever ways such a union shop arrangement facilitates other, unauthorized discriminations must be borne as inescapable incidents of a legislatively approved contract term.

"Had the 1945 decree simply represented relief awarded by the District Court after a trial of the action instituted by petitioners, there could be little doubt but that, faced with the 1951 amendment to the Railway Labor Act, it would have been improvident for the court to continue in effect this provision of the injunction prohibiting a union shop agreement as being unlawful per se, or its use as an instrument to effectuate other statutorily forbidden discriminations. That provision was well enough under the earlier Railway Labor Act, but to continue it after the 1951 amendment would be to render protection in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege denied and deniable to no other union. This conclusion would not be affected by the circumstance, which the District Court here found, that the unions' hostility to nonunion employees still continued, for any discriminations that might be facilitated by the union shop clause have been legislatively determined to be an expense more than offset by the benefits of such a provision.

"What seems plain to us in reason, as to a litigated degree, is amply supported by precedent. In *Pennsylvania* v. *Wheeling & B. Bridge Co.* (US) 18 How 421, 15 L ed 435, supra, this Court was also required to deal with the

effect upon an outstanding injunction of subsequent congressional action. . . A later Act of Congress declared the bridge to be a lawful structure in its existing position and elevation. The injunction was dissolved. . .

"The principles of the Wheeling Bridge Case have repeatedly been followed by lower federal and state courts. (footnote omitted) We find no reason to recede from them.

"That it would be an abuse of discretion to deny a modification of the present injunction if it had not resulted from a consent decree we regard as established. . ."

The holding in *System Federation, supra,* should be controlling in the instant case since the factual situation is quite similar. Just as Congress had amended the Railway Labor Act in *System Federation No.* 91 after an injunction had been entered by the court, so in our case had HEW revised its regulations after an injunction had been entered. In both instances (the amendment and the revision) what the respective district courts had found to be forbidden by law and had therefore enjoined in the first instance had by subsequent action become permissable and legal. And just as the District Court in *System Federation No.* 91 had refused to grant relief against the prospective application of the injunction because the unions' hostility to nonunion employees still continued, so in the instant case did the District Court refuse the requested relief because of the defendant, Commissioner's noncompliance with the court's prior orders and with what it characterized as a lack of "clean hands".

But as the Supreme Court stated, supra, in *System Federation No.* 91, ". . . it would have been improvident for the court to continue in effect this provision of the injunction prohibiting a union shop agreement as being unlawful per se, *or its use as an instrument to effectuate other statutorily for-*

bidden discriminations." (emphasis added) So too, is it improvident for the District Court to continue in effect, aganst the defendant, Commissioner, the provision of the injunction requiring compliance with the former HEW stricture requiring AFDC applications to be processed within thirty days, when the expertise of the administrative agency has been exercised by revising the former regulation so as to now allow a period of forty-five days for this task.

And, finally, as the Court said in *System Federation No. 91, supra,* "... to continue it [the prospective application of the injunction] after the 1951 amendment would be to render protection in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege denied and deniable to no other union." So in our case to continue the application of the injunction to the thirty-day processing requirement for AFDC applications would be to render protection in no way authorized by the revised federal regulation at the expense of a privilege denied and deniable to no other welfare department in our sister states.[9]

IV.

There was no need for the Trial Court to determine whether the changes in the HEW regulations constituted the "Extraordinary Circumstances" required for relief under Rule 60(b)(6).

The District Court in its ruling denying the defendant's motion for relief stated [A,34] that "[t]he changes in the HEW regulations do not constitute the 'extraordinary circumstances' required for relief under Rule 60(b)(6) [citing] *Harrell* v. *Harder, supra,* 369 F.Supp. at 814."

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[9]The State of Georgia was recently granted relief similar to that being sought here in *Stovall et al* v. *Harden,* Civil No. 15243, (U.S.D.C., N.D., Ga., March 21, 1974).

Harrell v. *Harder* was a case decided by the same district court as in the instant case, and the defendant, Commissioner, in this case was also the defendant in that case. In addition, the motion for relief from judgment was brought by the defendant as a result of the same revision of the HEW regulations (but a different section thereof) which appeared in 38 Federal Register 22005 *et seq.* on August 15, 1973. In that case, the district court granted defendant's motion for relief from judgment, and in that opinion, the court answered the objection which it raised in this case that "the changes in HEW regulations do not constitute the 'extraordinary circumstances' required for relief under Rule 60(b)(6)," at p. 814, when it said:

> "... While these changes in departmental procedures may not constitute the 'extraordinary circumstances' required for relief under Rule 60(b)(6), they are 'changes in conditions' which may make continued enforcement of my earlier orders inequitable in certain respects, *Schildhaus* v. *Moe, supra,* and thus may be sufficient to justify relief under Rule 60(b)(5)."[10]

As stated previously, the defendant believes he is entitled to relief under clause (5) of Rule 60(b) and, therefore, there is no need to consider whether a change in the HEW regulations constituted the "extraordinary circumstances" to justify relief under clause (6) of the Rule.

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[10]See 7 Moore Federal Practice, Para. 60.26[4] p. 335, n. 31. The footnote indicates that in *McGrath* v. *Potash, supra,* (in which the subsequent enactment of a statute made the Administrative Procedure Act inapplicable to deportation proceedings) the court, in granting relief, relied upon clause (6) ["extraordinary circumstances"] of Rule 60(b). The author indicates his belief that clause (5) ["no longer equitable"] was the more proper basis for relief.

V.

In denying Defendant's Motion for Relief from Judgment, the District Court improperly substituted its own Judgment for that of HEW.

The District Court, as an additional reason for denying the defendant's motion for relief from judgment [A,35] stated:

> "That relief in the instant case at this time would be inappropriate is also indicated by Section 206.10(a)(5) of the amended regulation, which provides:
>
> '(5) Financial assistance and medical care and services included in the plan shall be furnished promptly to eligible individuals without any delay attributable to the agency's administrative process . . .'"

Under Title 42 U.S.C. Sec. 1302, Congress delegated to the Secretary of HEW the power to make and publish such rules and regulations as may be necessary to the efficient administration of, *inter alia*, the AFDC program. It was under this authority that the aforesaid revised HEW regulations were published in the Federal Register. The Secretary of HEW solicited the comments of interested parties when he published the proposed regulations on April 20, 1973. When the revised regulations were published in the August 15, 1973 number of the Federal Register, the Secretary indicated that he had received a total of 696 letters from State and local welfare agencies, members of Congress and State legislatures, other State officials, legal aid groups, recipients and recipient groups and other organizations and individuals.

In commenting on the specific revision of Section 206.10 (a)(3), the Secretary set forth his reasons for increasing the

period allowed the states for processing AFDC applications from thirty days to forty-five days.[11] And, of course, he thereupon promulgated the revised Section 206.10(a)(3), *supra*, which increased the time allowed for processing AFDC applications from thirty days to forty-five days, and Section 206.10(a)(6), *supra*, which provided that financial assistance shall begin no later than the date of authorization of payment or thirty days from the date of application, whichever is earlier.

In the face of all this, it is difficult to see how the District Court held that the granting of relief in this case would be inappropriate because the revised Section 206.10(a)(5) provided that "... financial assistance ... shall be furnished promptly to eligible individuals without any delay attributable to the agency's administrative process...." It was the function of HEW to interpret the "reasonable promptness" provision of 42 U.S.C. Section 602(a)(10) in the first instance. The language of Section 206.10(a)(3) is in most specific terms, and it increases the time allowed to forty-five days. So, too, is the language of Section 206.10(a)(6) which does not require payment from the date of application.[12] When faced with a problem of statutory construction, the Supreme Court shows

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[11]"... Objections to the granting of 45 days for action on applications stressed that it would cause undue hardship and delay the granting of assistance; increase agency expenses and inefficiency and increase expenditures for general assistance and emergency assistance. State and local welfare agencies considered it a more realistic time frame.

"The time extension is necessary in view of the quality control requirement that eligibility be verified. While it is expected that most applications can be completed in a much shorter time, it is recognized that some cases will require a longer period. Where hardship may result to an apparently eligible individual, many States provide for federally matched emergency assistance for up to 30 days, while the application for assistance is being processed. Moreover, there is no fiscal incentive to delay, since cases found eligible must be paid back to the 30th day of application. 38 *Fed. Register* 22007, (August 15, 1973)."

[12]It is noteworthy that the District Court, in denying defendant's Motion For Relief did not refer to Section 233.20(a)(1). In its original order of June 16, 1972, [A,12] the District Court had held,

great deference to the interpretation given the statute by the officers or agency charged with its administration. *Udall* v. *Tallman*, 380 U.S. 1, 855 Ct. 792, 13 L. Ed.2d 616, 625 (1965).

The District Court, however, ignored this specific language, and, in effect, it thereby substituted its judgment for that of the administrative agency to which Congress had delegated the function of administering the AFDC program.[13] But the District Court did not first make any explicit finding that the provisions of the revised Section 206.10(a)(3) or Section 206.10(a)(6) were unreasonable or arbitrary, or an abuse of the Secretary's discretion.[14] This action by the District Court thus constituted an unwarranted incursion by the judiciary into the administrative domain. *SEC* v. *New England Elec. System*, 390 U.S. 207, 211, 88 S.Ct. 916, 19 L.Ed.2d 1042 (1968).

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in ordering that payments be effective from the date of application, that the former practice was violative of 45 C.F.R. 233.20(a)(1) which provided that "... assistance for all applicants or recipients will be made on an objective and equitable basis..." The revised Section 206.10(a)(6), of course, directly refutes the claim that HEW intended that all financial assistance be effective from the date of application.

[13]That the district court was substituting its own judgment for that of HEW seems further supported by the language of the Court's opinion in its Ruling on Defendant's Motion For Relief [S1,p.6] as follows: "In view of the defendants' record of non-compliance with this Court's prior orders, the Court is loath to speculate on the adversity to which welfare applicants might be subjected if the 30-day requirement were relaxed to 45 days or if the Welfare Department were not compelled to make assistance effective from the date of application rather than from the date of determination of eligibility."

[14]This action was also contrary to the sentiment of this same court as expressed in *Harrell* v. *Harder*, *supra*, at page 813, n. 1, wherein the court stated: "... The Department of Health, Education and Welfare subsequently promulgated regulations governing the pre-termination fair hearing ... and *in deference to the Supreme Court's preference for administrative regulation rather than judicial control in this area* [emphasis added], cf. *Richardson* v. *Wright*, 405 U.S. 208, 209, 92 S.Ct. 788, 31 L.Ed.2d 151(1972), I vacated the permanent injunction and ordered the defendants to conform to the HEW regulations..."

VI.

The United States Supreme Court has expressed its approval of the revised HEW 45 C.F.R. Section 206.10 (a)(3).

In *Edelman* v. *Jordan*, U.S., 39 L.Ed.2d 662, 671, n.8 (1974), the Supreme Court, in commenting on the Court of Appeals decision which held [the HEW standard of] 45 days (for aid to aged and blind) and 60 days (for aid to the disabled) to be "an appropriate interpretation of the Congressional mandate of 'reasonable promptness', *Jordan* v. *Weaver*, 472 F.2d 985, 996 (7th Cir., 1973), said: "We agree with the Court of Appeals."

CONCLUSION

The defendant submits that the district court, in denying the defendant's Motion For Relief From Judgment erred in the following respects:

1) it ruled on the plaintiffs' Motion For Contempt prior to ruling on the defendant's Motion For Relief;

2) it applied an improper standard in determining whether or not to grant defendant's Motion For Relief from the *prospective* application of the permanent injunction;

3) it improperly substituted its own judgment for that of HEW.

The district court's action in thus denying the defendant's Motion For Relief From Judgment constituted an abuse of its discretion.

For the foregoing reasons, the district court's denial of the defendant's Motion For Relief From Judgment should be set aside and the prior orders of the court should be modified so as to allow the defendant to comply with the revised HEW regulations.

Respectfully submitted,

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